Commonwealth of Massachusetts
State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851

CONFLICT OF INTEREST OPINION
EC-COI-92-17

FACTS:

You were the public health agent for the Town. In that capacity, you participated in negotiating and implementing a contract ("the first contract") between the Town and ABC, Inc. (ABC) for disposal of waste at the Town's municipal landfill from ABC's site. That contract gives ABC the exclusive right to operate a portion of the municipal landfill (the ABC landfill) until the contract expires, and allows ABC to dump a specified volume of waste per year from the ABC site in the ABC landfill, in return for a specified fee per volume paid to the Town (and other consideration).

Because ABC did not dump as much waste as expected, the Town did not receive as much revenue in fees as it had hoped. Therefore, the Town recently issued a request for proposals (RFP) to dump additional waste. DEF, Inc. (DEF), of which ABC is a wholly owned subsidiary, was the only bidder for this "second contract," a result the Town expected because the first contract required ABC's consent for any other dumping in the ABC landfill. The Town and DEF are now negotiating the details of the second contract. According to the RFP's specifications, the second contract will not by its terms amend the first contract, but will in addition allow DEF to dump waste from sites other than ABC's in the same ABC landfill, in return for a higher fee per volume. The second contract's RFP contains numerous references to the first contract, including a limitation on the non-ABC waste to be dumped under the second contract, which will depend in part on the amount of ABC waste dumped under the first contract. The second contract, which will expire after the first contract, will also include an elaborate provision allowing DEF the option of assuming exclusive operation of the ABC landfill after the first contract expires.

Meanwhile, you left your Town position and became an employee of DEF. You now[1/] wish to participate in negotiating and implementing the second contract on behalf of DEF, including continued contacts with Town officials.

QUESTION:

May you receive compensation from DEF for your work in negotiating and implementing the second contract, and may you contact Town officials on DEF's behalf for this purpose?

ANSWER:

No.

DISCUSSION:

When you were the Town's public health agent, you were a "municipal employee" for the purpose of the conflict of interest law. G.L. c. 268A, §1(g). Therefore, you are now subject to G.L. c. 268A, §18(a),[2/] which forever prohibits you from

> knowingly act[ing] as agent or attorney for or receiv[ing] compensation directly or indirectly from anyone other than the same . . . town in connection with any particular matter in which the . . . town is a party or has a direct and substantial interest and in which [you] participated as a municipal employee while so employed . . . .

Since it is clear that you participated as a municipal employee in the first contract, a "particular matter"[3/] to which

the Town is a party, the question presented is whether your negotiating and implementing the second contract for DEF is "in connection with" the first contract. For the following reasons, we conclude that it is.

In deciding whether a former public employee's present work for private compensation is "in connection with" a particular matter in which he participated while a public employee, the Commission's analysis in previous opinions has varied.[4/] We have sometimes focused only on whether the former employee's present work related to a "new" or "different" government particular matter, without considering whether the work was also "in connection with" the previous particular matter in which he participated as a public employee. *See, e.g., EC-COI-89-34; 85-74; 85-52; 83-80*. In other opinions, especially more recently, we have engaged in an analysis of factors showing whether the employee's proposed private work is closely enough connected to the matter in which he participated to bar him from acting as agent or attorney or receiving compensation. *E.g., EC-COI-91-1*. Without implying that the result reached in any previous opinion was incorrect, we now clarify that the latter analysis is required by the statutory language.

We interpret the statute "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *O'Brien v. Director of DES*, 393 Mass. 482, 487-88 (1984) (quotations and citations omitted). *See EC-COI-92-6*. What we said of the statutory purpose of G.L. c. 268A, §5, the cognate section governing former state employees, also applies here to the identical limitations §18 establishes for former municipal employees:

> The undivided loyalty due from a [public] employee while serving is deemed to continue with respect to some matters after he leaves [public] service. Moreover, [the statute] precludes a [public] employee from making official judgments with an eye, wittingly or unwittingly, consciously or subconsciously, toward his own personal future interest. Finally, the law ensures that former employees do not use their past friendships and associations within government or use confidential information obtained while serving the government to derive unfair advantage for themselves or others.

In re Wharton, 1984 SEC 182, 185.

As this language suggests, and as we have previously recognized, §§5, 12, and 18 strike a balance between these concerns about former employees' disloyalty to the government and the Legislature's competing desire not to foreclose entirely the former public employee's private employment in the very area of his greatest expertise. *EC-COI-81-34* (quoting Jordan, *Ethical Issues Arising from Present and Past Government Service*, in ABA, *Professional Responsibility: A Guide for Attorneys* 196 [1978]). The legislative history of the federal statute on which these sections were modeled[5/] makes clear that subsection (a) strikes this balance by "protect[ing] the government where it needs realistic protection," i.e., in connection with "matters with which [former employees] had contact while in the government — matters wherein they have true conflicts of interest." Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Laws, *Conflict of Interest and Federal Service* 228-29 (1960). *See* Perkins, *The New Federal Conflict of Interest Law*, 76 Harv. L. Rev. 1113, 1121, 1153-55 (1963). In short, the statutory purpose is to bar the former employees, not from benefiting from the general subject-matter expertise they acquired in government service, but from selling to private interests their familiarity with the facts of particular matters that are of continuing concern to their former government employer. *See* Braucher, *Conflict of Interest in Massachusetts*, in *Perspectives of Law, Essays for Austin Wakeman Scott* 20 (1964) (emphasizing the former employee's "access to confidential information which he might use against his former" employer); *see also* G.L. c. 268A, §23(c).

In an effort to be faithful to these purposes, we look to past opinions, identifying the factors we have previously applied to decide whether a former public employee's present work for private compensation (the "private work") is "in connection with" a particular matter in which he formerly participated while a public employee (the "government matter"). Most often, we have inquired whether the private work is "integrally related" to the government matter because they involve "the same parties, the same litigation, the same issues or the same controversy." *EC-COI-91-1* (not barred because different litigation raising different issues). *See EC-COI-89-7* (later stage of same environmental review process involves same controversy); *87-34* (barring challenge to, but not interpretation of, regulations employee assisted in promulgating); *84-31* (resubmission of same application presents same controversy); *81-28* (barred from new litigation involving same controversy, parties, and challenge to same statute's validity); *80-108* (barred from different but "integrally related" litigation based on different

individuals' complaints, but same claim, same issues, same businesses, and same time period). By contrast, we have allowed the private work if the issues have changed substantially from the former employee's government participation. *EC-COI-89-34* n.5 (substantially different legislative proposal); *85-74* (different buildings using changed plans); *83-80* (new alternatives, studied independently, for construction project).

In addition, we have examined the effect the proposed private work would have on the government particular matter. *See EC-COI-91-1* (not barred where new litigation did not seek to challenge or modify existing decree); *86-23* (not barred where work did not involve challenge or modification to existing escrow agreement). *See also EC-COI-87-34; 85-11; 81-34* (all holding that a former public employee who participated in drafting a regulation may later engage in private work to apply or interpret the regulation, but not to challenge its validity). This factor seeks to guard against potential abuse of past factual knowledge, confidential information, and personal associations in the context of the particular matter. It also expresses the legislative concern, which we recognized in *EC-COI-81-34*, about a former employee's "in essence seeking to tear down that which he had helped to build [or] taking advantage of a weakness that he discovered while in government service" (quoting *M. H. Gordon & Son, Inc. v. ABCC*, Suffolk Superior Court Nos. 38250, 37348, and Jordan, *supra,* at 196).

It remains to apply this analysis to your facts. First, your proposed work negotiating and implementing the second contract for DEF would be "integrally related" to the first contract. The amount of waste DEF will be allowed to dump will depend, by the explicit terms of the second contract's RFP, on the amount its subsidiary, ABC, dumps under the first contract. In fact, DEF's very ability to dump waste under the second contract depended (by virtue of the first contract's terms) on ABC's express written consent, consent ABC was willing to extend only to DEF.[6/] Ultimately, DEF will retain the option of actually operating the ABC landfill when ABC's (first) contract expires. It is clear that the two contracts involve, for practical purposes, the same parties and many of the same issues. *See EC-COI-91-1*.

The second factor discussed above is also significant here. The second contract will in effect modify the first contract in an essential respect: it will remove the first contract's limitation to ABC's site as the sole source of the waste to be dumped in the municipal landfill. Instead, the second contract will allow waste from the other DEF sites to be dumped as well, thereby substantially increasing the actual amount of waste dumped by ABC-DEF over time, and in addition will significantly increase the fee paid for dumping the additional waste. Indeed, this appears to be both the Town's and DEF's principal purpose in negotiating the second contract.[7/]

It is true that the second contract will not, in so many words, amend the first contract. As you point out, this appears to result from a provision of the state Uniform Procurement Act, G.L. c. 30B, §13(1), which prohibits amending an existing contract unless "the unit prices remain the same or less." The fact that c. 30B required a new contract, rather than an amendment to the existing contract, does not control our analysis under G.L. c. 268A. As we said at the outset, the question for us is **not** whether your private work would relate to a "new" or "different" particular matter. Rather, the only question, by the very language of §18(a), is whether your proposed private work would be "in connection with" the first contract, the government particular matter in which you concededly did participate while a public employee.

For the reasons stated above, we conclude that the answer to this question must be yes — the factors that we have identified, as guides to the proper application of "in connection with," have clearly been satisfied. Therefore, G.L. c. 268A, §18(a) prohibits you from receiving compensation from DEF, and from acting as its agent, in negotiating and implementing the second contract.

Date Authorized: June 16, 1992

[1/]This opinion addresses only your future conduct. *See* G.L. c. 268B, §3(g).

[2/]Because you left town employment more than one year ago, §18(b), which concerns matters under your "official responsibility" in which you did not actually participate, no longer applies to you.

[3/]"Particular matter" is defined to include, among other things, "any . . . contract . . . ." G.L. c. 268A, §1(k).

[4/]In this discussion, we examine our precedents construing G.L. c. 268A, §§5, 12, and 18, the statutes governing former state, county, and municipal employees respectively, because these provisions are substantially identical.

[5/]Special Commission on Code of Ethics, *Final Report*, H. 3650, at 8 (1962). *See, e.g., Everett Town Taxi, Inc. v. Board of Aldermen of Everett*, 366 Mass. 534, 536-37 (1974).

[6/]The extent of the integral relationship between the two contracts is perhaps most graphically revealed by the fact that the DEF Regional Vice President who signed DEF's response to the second contract RFP, also signed (as ABC Vice President) ABC's attached consent allowing DEF to dump additional waste in the ABC landfill, as required by the first contract.

[7/]Obviously, your negotiation and implementation of the second contract would require you to deal repeatedly, on many of the same factual issues, with the very municipal government colleagues with whom you participated as a public employee in negotiating the first contract.